

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 July 2012

BALCA Case No.: 2011-PER-02756
ETA Case No.: A-11118-74205

In the Matter of:

INTERCONTINENTAL ENTERPRISES, INC.,
Employer

on behalf of

SREENIVASAN, URMILA THATTAPARAMBIL,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Suku Nair
President, Intercontinental Enterprises, Inc.
For the Employer

Before: **Johnson, Purcell and Vittone**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at 20 C.F.R. Part 656.

BACKGROUND

The Employer filed a Form 9089 Application for Permanent Employment Certification for the position of “Senior Food Technologist.” (AF 12-40).¹ This is a professional position requiring a Master’s degree in Medical and Research Technology, two years of training in Nutrition Research, and two years of experience in the job offered. (AF 26-27). The work site was listed as Tortilleria Pacifico Company in Hyattsville, Maryland. (AF 26). The Employer reported on the Form 9089 that it ran two Sunday newspaper advertisements in The Washington Examiner. (AF 29-30). The Certifying Officer (“CO”) denied certification, finding that The Washington Examiner was not the newspaper of general circulation “most appropriate to the occupation and the workers likely to apply for the job opportunity.” (AF 8-10). The CO focused on the fact that the job is located in the Washington, DC area and stated that the expectation is that workers will choose newspapers with a substantial classified section because of the greater probability of finding a potential job opportunity. The CO stated: “A newspaper with a classified section with advertisements for a large number of job opportunities, and one that includes both professional and non-professional positions as well as positions in various skill levels, industries and companies in a given field will be of greater interest to an individual seeking a job opportunity than a newspaper with a more limited classified section.” (AF 9).

The Employer requested reconsideration of the denial. (AF 1-7). The Employer argued that The Washington Examiner “does in fact contain advertisements for similar, if not the same, job opportunities for which employment is being sought” and “in fact has a

¹ In this decision, AF is an abbreviation for Appeal File.

substantial classified section because of the greater probability of finding a potential job opportunity.” (AF 1). The Employer argued that The Washington Examiner “has a classified section with advertisements for a large number of job opportunities that includes both professional and non-professional positions as well as positions in various skill levels, industries and companies in a given field.” (AF 1). The Employer attached a printout of a Wikipedia article about The Washington Examiner, (AF 4-6) and argued that because of the size of the circulation noted in that article, it was in fact the newspaper most appropriate to the occupation and workers. (AF 1).²

DISCUSSION

Under the basic recruitment process, if the application is for a professional occupation the employer must, among other recruitment steps, place two print advertisements. Newspaper advertisements must be “in *the* newspaper of general circulation in the area of intended employment *most* appropriate to the occupation and the workers likely to apply for the job opportunity and *most* likely to bring responses from able, willing, qualified, and available U.S. workers.” 20 C.F.R. § 656.17(e)(1)(i)(B)(1) (emphasis added). When this regulation was being promulgated, the Employment and Training Administration explained in the proposed rule:

Under the current system [i.e., the pre-PERM regulations], the employer may advertise, when a newspaper of general circulation is designated as the appropriate advertising medium, in any newspaper of general circulation. However, our experience has shown that some employers routinely place newspaper advertisements in those newspapers

² Because the request for reconsideration was postmarked more than 30 calendar days after the denial was issued, the CO declined to process the request, and instead forwarded an Appeal File to BALCA. In the transmittal letter, the CO noted that the Employer had not addressed why it had submitted its request for reconsideration beyond 30 days from the issuance of the denial. The Employer then filed a Motion to Reopen and Reconsider with the CO. The CO forwarded this motion to the Board as a supplement to the Appeal File. In the motion, the Employer’s president explained that he had been out of the country from July 7, 2011 to August 8, 2011. The Employer documented his travel with copies of his passport, travel itinerary, and airline boarding passes. For purposes of this appeal, we will assume, without deciding, that overseas travel is sufficient grounds for equitably tolling the period for requesting reconsideration.

with the lowest circulation and that these publications are often the least likely to be read by qualified U.S. workers. Therefore, in order for the employer's job opening to receive appropriate exposure, the proposed regulation requires that the mandatory advertisements appear in the newspaper of general circulation most appropriate to the occupation and the workers most likely to apply for the job opportunity in the area of intended employment. For example, in a relatively large metropolitan area such as Philadelphia, Pennsylvania or Washington, DC, it would not be appropriate to place an advertisement for a computer professional in a suburban newspaper of general circulation since workers interested in professional jobs consult the metropolitan newspapers in the area of intended employment with the largest circulation rather than the suburban newspapers of general circulation. On the other hand, it would be appropriate to advertise in a suburban newspaper of general circulation for nonprofessional occupations, such as jewelers, houseworkers or drivers.

ETA, Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 C.F.R. Part 656, 67 Fed. Reg. 30466, 30471 (May 6, 2002).

In the instant case, the Employer placed its mandatory print advertisements in The Washington Examiner. The Employer's argument and the Wikipedia article only show that The Washington Examiner has a reasonably large circulation and has "help wanted" classifieds. It does not establish that it was the best choice for the job at issue. As the Wikipedia article produced by the Employer states, this newspaper "is printed in a 'compact' format, also known as a tabloid format." The Wikipedia article does not discuss the classified section of this newspaper.

Although The Washington Examiner possibly has a wider circulation than a limited suburban newspaper, the Employer has not proved that it is *the* newspaper in the Washington, D.C. area *most* appropriate to the occupation in question and the workers likely to apply for the job opportunity and *most* likely to bring responses from able, willing, qualified, and available U.S. workers. Although the CO did not expressly identify which newspaper in the Washington, D.C. area he considered to have a more

substantial classified section than The Washington Examiner, we note that The Washington Post, for example, is recognized as one of the United States' major newspapers.³ Moreover, it has been recognized by the District of Columbia Court of Appeals as the major circulation newspaper in the Washington, D.C. area.⁴ Thus, we find that the Employer's position that The Washington Examiner was the most appropriate newspaper in which to place an advertisement for a professional position is untenable. *See Carlos Uy III*, 1997-INA-304 (Mar, 3, 1999)(en banc), slip op. at 13 and n.21 (adjudicator may consider inherent implausibility of proponent's position).

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of certification is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a

³ *See, e.g., Schwab v. Philip Morris USA, Inc.*, 449 F.Supp.2d 992, 1143 (E.D.N.Y. 2006), *reversed on other grounds sub. nom. McLaughlin v. American Tobacco Co.*, 522 F.3d 215, (2nd Cir. 2008) (court recognized The New York Times, The Washington Post, and The Wall Street Journal, as three major national newspapers).

⁴ *See Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 331 (D.C.2000), *cert. denied*, 530 U.S. 1270 (2000) (court held that personal jurisdiction was proper because the defendant had "plac[ed] pages of large, illustrated advertisements often in bold letters, with shopping incentives, in the District's major circulation newspaper, the Washington Post, [and thus] obviously solicited customers from the District for their stores in Maryland and Virginia, clearly 'with the expectation' that District residents would purchase products sold in those stores.").

party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.